

## QUESTIONS AND ANSWERS

### Federal Appeal of NPDES permitting at SFWMD structures S-2, S-3 and S-4

January 16, 2009

#### **What is the National Pollutant Discharge Elimination System (NPDES)?**

The National Pollutant Discharge Elimination System (NPDES) is the federal program established by the Clean Water Act under which the United States Environmental Protection Agency (EPA) is authorized, through permits, to regulate the disposal of domestic and industrial waste from point sources, such as factories and wastewater plants, into the nation's waterways.

#### **How is NPDES used to protect waterways?**

Since the NPDES program was created in the 1972 Clean Water Act, the EPA has consistently used NPDES to regulate activities that introduce pollutants to navigable waters. NPDES permits are most commonly required for industrial or municipal purposes, such as factories.

For more than 35 years, EPA has not used the NPDES program to regulate structures that merely transfer water for flood control and other purposes from one body to another. The Clean Water Act is structured to hold polluters responsible for limiting the introduction of waste from entering the nation's waters. Congress never intended to put responsibility for pollution control on state or local water managers who transfer and manage water resources for public safety and uses.

#### **Why is the South Florida Water Management District in this court case?**

In 2007, U.S. District Court Judge Cecilia Altonaga ruled that a NPDES permit is required by the South Florida Water Management District to continue operating pumping stations S-2, S-3 and S-4 located in Palm Beach County for regional flood control and water supply purposes. In compliance with that order, the District applied to the Florida Department of Environmental Protection for an NPDES permit but also filed a Notice of Appeal to the Judge's order. Briefs have been filed with the 11<sup>th</sup> Circuit Court of Appeals, and on January 16, 2009, oral arguments are being heard.

#### **Why is the District appealing the Court's decision?**

The intention of the appeal is to address the issue of governance and jurisdiction. The appeal is not an attempt to circumvent regulations, avoid permits, lessen protection for the environment or reinforce back-pumping activities. The District maintains that it is not appropriate for federal permit requirements to trump a state's ability and right to manage the water resources of the state.

#### **What is the Environmental Protection Agency's position on this issue?**

Last year, the EPA issued a Rule clarifying that the District's pumping facilities were not required to obtain NPDES permits and that they are more sensibly left to other (non-NPDES) authorities, such as the Florida Department of Environmental Protection. The EPA, represented by the United States Department of Justice, has joined the District in the appeal. Additionally, the District's position is supported by other states, including California and Colorado, and dozens of other interests, including municipal groups and numerous water resource organizations.

**Are the S-2, S-3 and S-4 structures already regulated?**

Yes. The S-2, S-3 and S-4 structures are operated under a State permit in full compliance with State law. Florida's Lake Okeechobee Protection Act, passed in 2000, required the South Florida Water Management District to obtain a State permit for operating the structures that move water around the lake.

**Does the State permit protect water quality?**

Yes. The five-year State permit under which the structures are regulated establishes specific, science-based pollutant targets and a suite of measures necessary to help achieve a protective water quality limit of phosphorus. It also includes comprehensive monitoring and restricts the transfer of water into Lake Okeechobee from the Everglades Agriculture Area at the S-2 and S-3 structures, requiring the District to coordinate and report these pumping activities to the Florida Department of Environmental Protection. The District is in full compliance with the permit. A NPDES permit offers Lake Okeechobee no additional protective measures.

**Why then did the District apply for a NPDES permit?**

The District complied with the Court's direction to apply for a federal permit.

**Should the District have applied for a NPDES permit without a court order?**

NPDES permits have never been required for water management activities. However, when the District was first challenged for pumping water without NPDES permits, it inquired with the State and federal agencies that implement NPDES whether permits were appropriate. The United States Environmental Protection Agency and the Florida Department of Environmental Protection advised the District that no NPDES permits were required.

**Now that oral arguments have been made, what happens next?**

A decision on the appeal will be made in the coming months by the three-judge panel. There is no specific timeline on when that decision will be issued.